(3)

Supreme Court, U.S.
FILED
JUN 7 1999
CLERK

No. 98-1568

IN THE

Supreme Court of the United States

TRAFALGAR CAPITAL ASSOCIATES, INC.,
in its capacity as Managing General Partner of
Heywood Wakefield Associates Limited Partnership,
Petitioner,

v.

ANDREW CUOMO
in his capacity as Secretary of United States
Department of Housing and Urban Development,
EXECUTIVE OFFICE OF COMMUNITIES AND DEVELOPMENT,
and RURAL HOUSING IMPROVEMENT, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY TO BRIEF FOR THE FEDERAL RESPONDENT

OTTO J. HETZEL*
CARL A.S. COAN, JR.
CARL A.S. COAN, III
COAN & LYONS
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036
202-728-1070
Counsel for Petitioner

* Counsel of Record

1198

STATEMENT REQUIRED BY RULE 29.6

Plaintiff, Trafalgar Capital Associates, Inc., has no parent company and no nonwholly owned subsidiaries.

TABLE OF CONTENTS

Page

STATEMENT REQUIRED BY RULE 29.6 i

TABLE OF AUTHORITIES iii

REPLY TO RESPONDENT'S BRIEF 1

CONCLUSION 9

TABLE OF AUTHORITIES

Cases **Page**

Euromotion Inc. v. BMW of North America, Inc., 136 F.3d 866 (1st Cir. 1998) 7

Statutes

Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, Title II, § 289(a) and (b), 104 Stat. 4128 (1990) 2

The Stewart B. McKinney Homeless Assistance Act, Pub. L. No. 100-077, 42 U.S.C. 11301 *et seq.*, 102 Stat. 482. 2

42 U.S.C. § 1437f(c)(2)(C) ..... *passim*

Miscellaneous

OPTING IN: Renewing America's Commitment to Affordable Housing, U.S. Department of Housing and Urban Development, Washington, D.C., April 1999 3

IN THE

Supreme Court of the United States

No. 98-1568

TRAFALGAR CAPITAL ASSOCIATES, INC.,
in its capacity as Managing General Partner of
Heywood Wakefield Associates Limited Partnership,
Petitioner,

v.

ANDREW CUOMO
in his capacity as Secretary of United States
Department of Housing and Urban Development,
EXECUTIVE OFFICE OF COMMUNITIES AND DEVELOPMENT,
and RURAL HOUSING IMPROVEMENT, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

REPLY TO BRIEF FOR THE FEDERAL RESPONDENT

The Federal Respondent in its Brief in Opposition has provided statements that could be potentially misleading in attempting to dissuade this Court from granting the Petition for Certiorari. Petitioner has felt obligated to respond as follows.

1. The Project-Based Section 8 Program Continues to Affect a Most Significant Portion of the Federally Assisted Affordable Housing Stock.

The statement in the brief of Respondent Department of Housing and Urban Development (HUD) that "Congress eliminated the Moderate Rehabilitation Program effective

October 1, 1991, but allowed existing projects to continue" (Resp. Br. at 2) should not be read as reducing the significance of the extensive role that Project-Based Section 8 Units *still play* in providing housing to this country's low- and moderate-income families.

In its argument to this Court (Resp. Br. at 10), HUD erroneously characterizes the decision below only as one "concerning the calculation of rents for one project under a discontinued federal housing program." The continued major role of the Project-Based Section 8 units being considered in this Petition in providing affordable housing reflects the importance of this proceeding.[1]

This is a most significant case with respect to the effects this Court's grant of Certiorari would have. It is important for this Court to provide consistency between the various Circuits, three of which have prevented HUD from disobeying a Congressional mandate not to reduce contract rents brought on by HUD's continued efforts to avoid its obligations under its Project-Based Section 8 programs.

HUD's unceasing efforts to reduce the full levels of its financial commitments in this program are not case specific, but, rather, are pervasive. If allowed to proceed on this tack, HUD will violate a Congressional command that will have a continuing impact on the administration of the principal program that involves private owners in developing affordable housing in reliance on HUD contractual commitments.

---

[1]In fact, the moderate rehabilitation program still continues to support the provision of single room occupancy dwellings for the homeless under Title IV of the Stewart B. McKinney Homeless Assistance Act, Pub. L. 100-77, 42 U.S.C. 11301 *et seq.*, 102 Stat. 482. See Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, Title II, § 289(a) and (b), 104 Stat. 4128.

According to a recent HUD publication, "OPTING IN: Renewing America's Commitment to Affordable Housing," dated April 1999:

> [t]he Section 8 program now helps 3 million families around the country afford decent housing, *more than double the number of families assisted by the next largest housing program, public housing.* Section 8 includes two forms of subsidy: tenant-based and project-based, each assisting roughly one-half the total Section 8 units *(Id.* at ii, Executive Summary; emphasis added.).

Of these three million units, roughly one million four hundred thousand receive Project-Based subsidies. (OPTING IN at 4, Figure 1) The units are located in every state of the nation. *(Id.* at 5, Figure 2) ". . . Section 8 provides assistance to thousands of families in each and every State around the country–in urban centers and rural farmland, in high rise apartments and single family homes." *Id* at ii. HUD's financial support is coordinated with owner investments that relied upon the commitments of Federal funds over the contract term of these projects. (See Pet. at 4-5).

Thus, while *new* Project-Based subsidies are no longer being funded, the impact of the First Circuit's decision on the investment expectations of investor owners is both broad, long-term and significant. The Section 8 Program is the primary vehicle for supporting private market investment in affordable housing, and the commitments made by HUD to the private sector and the Congressional demand that these investment expectations be binding on the Federal government continue unabated.

Project-Based Section 8 units constitute almost one-half of the privately owned and operated housing stock available at affordable rents to low- and moderate-income families. The

significance of Project-Based units continues because of the large number of units involved, even as more recent Federal policies have now emphasized funding for Tenant-Based Section 8 units.

The continued viability of Project-Based Section 8 units and protection of the investment-backed expectations of the private sector are crucial for millions of low- and moderate-income persons.

2. HUD Acted Arbitrarily and Capriciously in Refusing to Increase the Contract Rent and Thereby the Subsidy Levels Required Under the HAP Contract.

The Housing Assistance Payments Contract (HAP) commits HUD to provide specified levels of subsidies once a contract rent determination is made. Pursuant to the preliminary Agreement to Enter Into Housing Assistance Payments Contract (AHAP), the HAP is to include increases of contract rents to the required levels where undercalculations in HUD's determinations are demonstrated. In combination, the end result constitutes the contract rent that was "in effect" even if not yet fully implemented.

HUD's obligation is to honor the investment-backed expectations of those private owners with whom it has contracted. The contract provisions that call for full implementation of the complete contract rents are the basis on which the project has proceeded.

To the extent it can be demonstrated that HUD under-calculated those levels, as conceded by HUD here, Congress has determined that the full, valid contract rents that would otherwise apply cannot be "reduced." 42 U.S.C. 1437f(c)(2)(C). This Congressional mandate applies not only to moderate rehabilitation projects, but also to newly constructed and substantial rehabilitation projects as well, *i.e.*, all the Project-Based Section 8 Subsidy Programs. *Id.*

HUD attempts to subvert its obligations, however, by offsetting the increases required in the contract rents by leaving its payments "at the levels already in effect." Essentially, HUD fails to accord Project-Based Section 8 owners the increases to which they are entitled. This is a "reduction" within the contemplation of 42 U.S.C. 1437f(c)(2)(C). There should be no question that maintaining the status quo denies owners the contract rent increases that the program statute, the AHAP, and the HAP contracts require. Thus, the project's contract rents were effectively reduced.

3. HUD Attempts to Assert Errors in Its Initial Rent Determination Without a Showing Such Errors Actually Occurred.

There is nothing in the record other than HUD's assertions that justifies its claim that the original grant of an exception rent, nine years previously, was erroneous. (Resp. Br. at 6) To support its assertion that the original determination of the exception rent was "erroneous," HUD hypothesizes (Resp. Br. at 12-14) that its responsible official to whom the decision was delegated failed to act in conformance with applicable regulations. HUD does so without having provided any evidence in the record below of the basis on which the decision was actually made. In fact, HUD conceded nine years later that such evidence no longer existed when Petitioner requested HUD to provide the evidence to support its claims.

HUD also references language in the circuit court opinion to support its contention of error. (Pet. App. 15a-16a & n.7) The circuit court's analysis appears to have assumed that there was evidence as to the basis on which the HUD Regional Administrator made his decision. Whether the standards HUD cites (Resp. Br. at 12-14) were properly considered, is not known.

Given that HUD conceded below it has no direct evidence to support its contention of error since the documents on which the decision was based are no longer available, HUD is left with only a subsequent hypothesis as to what the Regional Administrator relied upon. It could show nothing more.

HUD further compounds its problem since it only assumes that the criteria applied by its Regional Administrator failed to incorporate applicable HUD standards without any basis for that assumption. These are an insufficient basis to support HUD's contentions of error by its own, duly delegated official.

HUD has unsuccessfully made analogous arguments in asserting error in its own contract rent determinations in other cases before three other circuit courts, previously detailed to this Court. (Pet. at 11-18) As Congress recognized, HUD has continued to resist the Congressional prohibition by failing to adhere to contract rent determinations. Clearly, Congress was concerned that such action by HUD undercuts a primary tenet, the need for certainty of financial commitments, in a program in which private investments are an essential basis for the functioning of the program that assists low- and moderate-income families.

Petitioner had no reason to contest HUD's assertion of error by the Regional Administrator. (See, Pet. App. 16a, n. 7) The District Court, at Pet. App. 50a-52a, correctly notes Petitioner argued that the Regional Administrator's exception rent determination was binding on HUD.

On appeal, there was no need to argue the correctness of the Administrator's decision to counter HUD's assertion of error, since the District Court found the offset of the exception rent decision invalid as a reduction. There was no obligation for Petitioner to "argue" the correctness of the Regional Administrator's decision nine years previously either to the District or the Circuit Court. It seems somewhat disingenuous,

moreover, for HUD to assert that Petitioner needs to prove the correctness of HUD's own, duly delegated official's decision.[2]

None of the cases on which HUD relies to justify its overturning of the decision of its official to whom that decision was properly delegated justify repudiation years later of HUD's decision, particularly in light of Congressional action to prevent just such contentions of error and reductions of the applicable contract rent, as occurred here. None of the cases HUD cites (Resp. Br. at 13-14) involve the exercise on behalf of a government agency of its official to whom that decision was specifically delegated. To the contrary, the authority to act for the government was at issue in each instance. HUD's concept that it may challenge at any time its official decisions once made, despite the detrimental reliance by owners in that decision, flies in the face of the statutory instructions that HUD may not reduce the contract rents that should be in effect.

---

[2] In that the District Court decision was a result of cross motions for summary judgment, under FRCP 56 the underlying facts must be viewed in the light most favorable to Petitioner. *See Euromotion Inc. v. BMW of North America, Inc.*, 136 F.3d 866, 869 (1st Cir. 1998). Petitioner did argue the Regional Administrator's exception rent decision was valid in Petitioner's Petition for Rehearing, at 9-14, once the matter was raised in the First Circuit's opinion. In particular, Petitioner pointed out that the two grounds HUD submitted to show error, the same grounds adopted by the First Circuit, were based on available facts that fully justified and were consistent with the Regional Administrator's decision. In all pleadings, including Petitioner's Statement of Material Facts in Dispute, Petitioner stated that it did not concede that the Regional Administrator's decision was incorrect, but rather asserted that the decision was properly made.

4. An Offset "Reduces" HUD's Contractual Obligation to Provide Required Rent Subsidies, Including Subsequently Demonstrated Errors in HUD's Calculations.

HUD resorts to sophistry in an attempt to create a distinction that would allow it to reduce required levels of contract rents. As shown above, HUD's position is simply an assertion of error and then an assumption that such error originally occurred some nine years previously. Three other Circuits rejected analogous HUD assertions that various asserted errors justified reducing contract rents.

So long as it is fully understood, as apparently the First Circuit failed to grasp by its parsing of the two calculation errors separately from the original exception rent determination, the applicable Contract Rent (including the original exception rent) constituted a set level of subsidy. No matter how one tries, clearly Congress intended that such reductions be precluded. The total contract rent includes the amount of the demonstrated HUD miscalculations in arriving at the correct subsidy level. That investment-backed expectation is still "reduced" by HUD's convoluted attempt to distinguish an offset from a reduction to avoid the Congressional mandate.

As the District Court noted on this issue, at Pet. App. 51a-52a, relying on 42 U.S.C. 1437f(c)(2)(C):

> HUD may not, therefore, offset the increase in Project rents due to the additional rehabilitation costs and the correction of the debt-service constant, with a reversal of the Boston Regional Administrator's decision to grant exception rents.

As with its assertions of error to justify reductions of contract rents rejected by the other circuits, HUD would attempt to avoid the prohibition of Congress by unproven declarations that

error occurred in setting contract rents. Such violations of Congressional mandates should not be countenanced.

CONCLUSION

For the reasons set forth above and in its Petition for Certiorari, Petitioner requests this Court to grant Certiorari to review important questions of law relating to the principal program providing housing assistance through private sector owners to low- and moderate-income families and to provide consistency of interpretation of the Congressional statute at issue as between the Circuit Courts of Appeals.

Respectfully submitted,

Otto J. Hetzel*
Carl A.S. Coan, Jr.
Carl A.S. Coan, III
Coan & Lyons
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036
202-728-1070
Counsel for Petitioners

* Counsel of Record

Dated: June 7, 1999